United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-2245

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No
74-2245

ERNEST FRANCIS,

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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P/S

REPLY BRIEF FOR PETITIONER

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4

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES

TABLE OF ADMINISTRATIVE DECISIONS

TABLE OF STATUTES

TABLE OF ADMINISTRATIVE REGULATIONS

TABLE OF CONGRESSIONAL REPORTS

POINT I

THE GOVERNMENT ERRS IN ITS CONTENTION THAT SECTION 212 (c) DOES NOT APPLY TO A LEGAL PERMANENT RESIDENT OF MORE THAN SEVEN YEARS WHO REMAINED IN THE UNITED STATES AFTER A CONVICTION FOR POSSESSION OF MARIJUANA.

The basic issue in this case is whether Congress in enacting Immigration and Nationality Act (INA) § 212 (c) (8 U.S.C. § 1182 (c)) intended to change the Seventh Proviso to Section 3 of the Immigration Act of 1917, 39 Stat. 874, to make deportable aliens who had not left and re-entered the United States ineligible for discretionary relief. Under the Seventh Proviso deportable aliens were eligible to apply for discretionary relief in deportation proceedings. If the alien had not left and re-entered the country after a conviction the practice was to withdraw the deportation proceeding and grant advance permission to re-enter the United States. Matter of A---, 2 I&N Dec. 459 (1946)*

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* It should be noted that the printed application form on which, pursuant to Immigration and Naturalization Service instructions, § 212 (c) discretionary relief must be requested

The government clouds this issue and misstates the Board of Immigration Appeals position in its insistance that eligibility for relief under INA § 212(c), 8 U.S.C. 1182 is dependent upon a distinction between exclusion and deportation.

Under both § 212(c) and its precursor, the Seventh Proviso to Section 3 of the Immigration Act of 1917 discretionary relief is available to deportable aliens facing deportation proceedings as well as excludable aliens facing exclusion proceedings. Matter of A---, 2 I&N Dec. 459 (1946) (Seventh Proviso relief granted in deportation proceedings); Matter of G--- A---, 7 I&N Dec. 274 (1956) (212 (c) relief granted in deportation proceedings in which the alien was deportable under I.N.A. § 241 (a) (11), (8 U.S.C. § 1251 (a) (11)) because of a conviction for marijuana related offense,

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(Footnote con't.) is still entitled 'Application for Advance Permission to Return to Unrelingquished Domicile' (Form I-191 and instruction attached thereto). The granting of advance permission is common. In Matter of Wolf 12 I&N Dec. 736, (1968) the alien was given advance permission to exit and re-enter the United States as many times as he wanted in a three-year time span.

the same basis on which deportation of petitioner is sought); Matter of Edwards 3 I&N Dec. 506 (1963) (212 (c) relief granted in deportation proceedings in which the alien was deportable under INA § 241 (a) (4), (8 U.S.C. 1251 (a) (4)), convicted of two crimes of involving moral turpitude after entry not arising out of a single scheme of criminal misconduct). However, in 1971 in Matter of Arias-Uribe, 13 I&N Dec. 696, the Board changed the long-standing practice under the 1917 act of allowing all deportable aliens in deportation proceedings, who were otherwise eligible, to apply for discretionary relief and limited this opportunity to those who had left and re-entered the United States sometime after their conviction.

Further the current administrative regulations of the Immigration and Nationality Service published in 1975 specifically provides that an application for §212 (c) discretionary relief may be made in a deportation as well as an exclusion proceeding, 8 C.F.R. § 212.3*

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* "An application for the exercise of discretion under section 212(c) of the Act may be submitted by the applicant to a special inquiry

Petitioner has been denied eligibility for discretionary relief not because deportation instead of exclusion proceedings were brought against him nor because he was charged with being deportable instead of excludable. Petitioner has been denied eligibility solely because he remained in the United States after his conviction for marijuana possession.

As petitioner more fully explains in his main brief at pages 9-13, this is not what Congress intended in its enactment of § 212(c). The changes made in the Seventh Proviso on its way to becoming § 212(c) were designed to limit discretionary relief to persons who were in the status of legal permanent residents and to stop the practice of

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(Footnote con't.)

> officer in the course of proceedings before him under sections 235, 236, and 242 of the Act and this chapter, and shall be adjudicated by the special inquiry officer in such proceedings, regardless of whether the applicant has made such application previously to the district director."

Section 242 of the Immigration and Nationality Act deals with deportation proceedings.

affording discretionary relief to those who entered illegally and were deported (in some instances without even having lived in the United States for seven years) and who sometime after deportation sought to re-enter the United States. See Mater of S--- 1 I&N Dec. 646 (1943); Matter of M--- 4 I&N Dec. 82 (1950) (more fully discussed in petitioner's main brief page 12).

The government seeks through several erroneous arguments to support its contention that Congress in its enactment of § 212 (c), intended to do away with discretionary relief for persons such as petitioner. The government asserts that both the Seventh Proviso and Section 212 (c) were designed for the narrow purpose of ameliorating hardship only to an alien who leaves the United States and is barred from entry upon his return and therefore one who has not yet left the country was not intended to be eligible for discretionary relief. Such an argument puts the government squarely in contention with its own administrative interpretations which belie that the purpose of the statutes was as narrow as the government contends. Aliens in exclusion proceedings, and aliens facing deportation proceedings whether or not they had left and re-entered the United States after a conviction were eligible for Seventh Proviso relief. Matter of C---

1I&N Dec.631 ((1943); Matter of A--- 2 I&N Dec. 459 (1946). The Board of Immigration Appeals has determined that an alien in an exclusive proceeding and a deportable alien in a deportation proceeding, if he left and re-entered the United States sometime after his conviction, are eligible for § 212(c) relief. Matter of G---A--- 7 I&N Dec. 274 (1956); Matter of Edwards 10 I&N Dec. 506 (1963). Further in Matter of Smith 11 I&N Dec. 325 (1965) the Board determined that a deportable alien may apply for § 212(c) relief in a deportation proceeding regardless of the fact that he remained in the United States after his conviction if he is also eligible for adjustment of status pursuant to I.N.A. § 245 (8 U.S.C. § 1255). By the interpretations of the govenment's own administrative body, the Seventh Proviso and § 212(c) therefore arenot limited, as the government contends, only to aliens seeking entry. The purpose of §212(c) is broader as was the purpose of the Seventh Proviso, to give discretionary relief and prevent hardship to legal permanent resident aliens of more than seven years.

The government ignores the irrational result of its position and urges upon this court the kind of unthinking wooden and mechanical interpretation of an immigration statute which has been rejected by both this circuit and

the Supreme Court. Rosenberg v. Fleuti, 374 U.S. 449 (1963); Delgadillo v. Carmichael, 332 U.S. 388 (1947)/ Di Pasquale v. Karnuth 158 F. 2d 878 (2nd Cir. 1947). Because "deportation can be the equivalent of banishment or exile" and the stakes are "high and momentous" for an alien who has acquired residence in the United States, courts will not attribute to Congress a purpose to make a resident alien's continued presence here dependent on "fortuitous and capricious" circumstances. Delgadillo v. Carmichael supra, 332 U.S. at 391/ See also Rosenberg v. Fleuti, supra 374 U.S. at 456; DiPasquale v. Karnuth, supra 158 F. 2d at 879.

As Judge L. Hand said in DiPasquale v. Karnuth, supra 158 F. 2d at 879, "We cannot believe that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous." If the government's position is accepted, eligibility for discretionary relief will be dependent on a fluke; whether the resident alien happened for example to have spent a few hours in Canada as in Matter of Edwards, 10 I&N Dec. 506 (1964)*

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* In Matter of Edwards, the Board of Immigration Appeals decided that an alien need not have made an "entry" under Rosenberg v. Fleuti, supra, for the purpose of a grant of

As the Board of Immigration Appeals itself determined in its interpretation of the Seventh Proviso such a situation would result in "capricious" and "absurd" consequences as "chance might be the factor determining substantive rights." Matter of A---, supra, 2 I&N Dec. at 461-2.

The government also seeks to support its position that Congress did not intend §212(c) to apply to persons such as petitioner by arguing that because the immigration statute provides other provisions to afford discretionary relief to deportable aliens such as suspension of deportation pursuant to I.N.A. § 244 (8 U.S.C. § 1254), Congress could not have intended § 212(c) to apply to deportable aliens. A similar argument was rejected by this court in Tibke v. I.N.S. 335 F. 2d 42 at 47 (1964). The court held that it would not be anomalous for aliens to be eligible for relief under more than one section of the immigration statute because the eligibility criteria under various sections are different.

(Footnote cont.) of relief under §212 (c) and therefore a brief absence of a few hours to Canada to attend a funeral was sufficient to qualify an alien deportable under INA 241 (a) (4) (8U.S.C. 1251 (a) (4), Conviction of two crimes of moral turpitude) for § 212(c) relief.

Relying on Arias-Uribe v. I.N.S. 466 F. 2d 1198 (9th Cir. 1972) the government further argues that because the Attorney General is not given authority to suspend deportation or to grant voluntary departure in lieu of deportation to persons convicted of a marijuana related offense, determining that § 212(c) relief was available to petitioner " would render inoperative those provisions of the Act which make deportation "mandatory" for aliens who have been convicted of or marijuana related offense. (Respondent's brief pg. 13). Firstly, persons convicted of a marijuana related offense are eligible for suspension of deportation pursuant to I.NA. § 244 (a) (2), (8 U.S.C. § 1254 (a) (2))*

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* 8 U.S.C. § 1254 (a) (2):

> (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and --
>
> (2) is deportable under paragraphs (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251 (a) of this title; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and

Secondly, the fact that an alien was ineligible for voluntary departure did not bar the alien from discretionary relief under the Seventh Proviso. The alien in Matter of A-- was statutorily ineligible for voluntary departure in lieu of deportation because he had committed a crime. The Board held that this did not bar advance exercise of Seventh Proviso relief in his behalf. Matter of A---, supra, 2 I&N Dec. at 461. There is nothing in the legislative history of § 212(c) which indicates that Congress intended to change this interpretation. Further, the fact that voluntary departure is barred to marijuana law offenders does not render this deportation unequivocally mandatory. Deportation proceedings based on a marijuana related conviction were initiated against the alien in Matter of G---A---, supra and he was thusly barred from the grant of voluntary departure. Yet,

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(Footnote con't.)

> proves that during all of such period he has been and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extemely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.
>
> 8 U.S.C. § 1251 (a) (11) (I.NA.§ 241 (a) (11)) provides that a person convicted of a marijuana related offense is deportable.

§ 212(c) discretionary relief was granted in his case.

Contrary to the government's contention, petitioner is not trying to conjure up a new remedy. He seeks only the opportunity to apply for relief which was available to persons exactly in the same position as petitioner for more than a half century*

The denial to petitioner of an opportunity to apply for discretionary relief is the aberration.

There is nothing in the legislative history of § 212(c) which indicates that Congress intended to change the practice under the Seventh Proviso of withdrawing deportation prceedings and granting advance permission to reenter the United States to persons such as petitioner.

To ascribe such an intent to Congress would result in irrational consequences: an alien who had sc little connection to this country that he was able to leave would be eligible, while an alien whose strong ties kept him here

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* From 1917, the date of the Seventh Proviso until 1971, when the Board of Immigration Appeals in Matter of Arias-Uribe. 13 I&N Dec. 696 (1971) determined § 212 (c) discretionary relief was not available to aliens facing deportation who had not left the country.

would not; eligibility for discretionary relief from banishment from home, family and country would turn a fluke such as whether the alien happened to have spent a few hours in Canada after his conviction. But if this court has any doubt about the true intent of Congress it must be resolved in favor of the alien. Fong Haw Tan v. Phelan, 333 U.S. 6, at 10 (1948), cf Rosenberg v. Fleuti 374 U.S. 449 at 458-9 (1963).

POINT II

IF A PERMANENT RESIDENT OF MORE THAN SEVEN YEARS WHO REMAINED IN THE UNITED STATES AFTER CONVICTION FOR POSSESSION OF MARIJUANA IS NOT ELIGIBLE TO APPLY FOR DISCRETIONARY RELIEF PURSUANT TO INA § 212(c), SECTION 212(c) VIOLATES PETITIONER'S FIFTH AMENDMENT EQUAL PROTECTION RIGHT.

If this court determines that §212(c) bars relief to petitioner because he remained in the U.S. after his conviction, the government argues both that the classification in §212(c) meets equal protection standards and that equal protection does not apply to an immigration statute.

The government's argument that §212(c) meets equal protection standards in circuitous and confuses purpose and classification. Even the equal protection test the government proposes requires that a statutory classification be rationally related to the purpose of the statute. But the government argues that the purpose of the statute is to provide ameliorative relief to persons who are seeking to or have made an entry into the United States and therefore restricting the relief to persons who are seeking to or have made an entry into the United States is rational. Such an analysis is clearly erroneous. Under the government's interpretation, the statute creates two classes eligible for

relief, permanent residents of more than seven years seeking to renter the U.S., permanent residents of more than seven years who have left and re-entered the U.S. after their convictions and one which is not, permanent residents of more than seven years who have remained in the United States. The purpose of the statute is to ameliorate hardships. The question is whether a classification which denies eligibility to legal permanent residents of more than seven years who have remained in the United States is rationally related to the purpose of ameliorating hardship. Clearly it is not.

The government tries to justify the discrimination of the statute by arguing that persons such as petitioner facing deportation proceedings are eligible for suspension of deportation and adjustment of status, which are not available for those who are eligible for §212(c) relief. This argument is completely erroneous. Suspension of deportation pursuant to I.N.A. §244 (8 U.S.C.§1254) and adjustment of status pursuant to INA §245 (8 U.S.C. §1255) and §212(c) may all be applied for in deportation proceedings. 8 C.F.R. §§212.3, 244, 245.2, The aliens in Matter G - A and Matter of Edwards, supra, who were granted §212(c) relief could have applied for suspension of deportation or adjustment of status because deportation proceedings were brought against them. Petitioner is in no better posture for access to adjustment or suspension than they. In reality, petitioner is not eligilible for suspension of deportation or adjustment of status*. The

existence of other statutes providing discretionary relief cannot justify the denial of relief to petitioner under §212(c) because the eligibility criteria for suspension of deportation and adjustment of status are very different from the eligibility criteria under §212(c). Tibke v. Immigration and Naturalization Service, 335 F.2d 42(2nd Cir. 1964).

The government further argues that denial of an opportunity to apply for §212(c) relief to petitioner is justified by the fact that the immigration law treats marijuana law offenders differently from persons convicted of other crimes. Such an argument is completely irrelevant. Persons convicted of a marijuana related offense who are seeking entry into the United States or who have left and re-entered the United States after their conviction are eligible for relief under §212(c). Matter of G - A supra.

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* Eligibility for suspension of deportation requires that an alien be physically present in the United States for ten years following the commission of the act which makes him deportable. I.N.A. §244 (8 U.S.C. §1254 (a)(2)). Petitioner is deportable because of a marijuana related conviction in 1971 and ten years have not yet elapsed. Petitioner as a native of the Western Hemisphere is not eligible for adjustment of status. INA §245(c) (8 U.S.C. §1254 (c)).

The government argues that petitioner has no right which is adversely affected by the statute. Section 212(c) creates a statutory right to apply for discretionary relief which is being denied petitioner in violation of equal protection. Several cases have firmly laid to rest the concept that constitutional rights turn on whether a governmental benefit is characterized as a "right" or a "privilege." Morrissey v. Brewer, 408 U.S. 471 at 481 (1972); Graham v. Richardson, 403 U.S.365 at 374 (1971); Goldberg v. Kelly, 397 U.S. 254 at 262 (1970).

The government further argues that equal protection standards cannot be applied to an immigration statute as Congress has complete and total power to make rules for the admission and expulsion of aliens which may not be disturbed by the judicial branch of government. To begin with, Congress itself has made it clear that in legislating with respect to the exclusion or expulsion of aliens its power is circumscribed by the mandates of the Constitution.

> It has been repeatedly held that the right to exclude or to expel all aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare; that this power to exclude and to expel aliens,

> being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution to intervene. (emphasis supplied) House Report 1365 82nd Cong., 2d Sess., p.6 (1952).

Neither do the cases cited by the government stand for the ambitious proposition asserted. Specifically this court in Noel v. Chapman 508 F. 2d 1023 (1975) applied equal protection standards in an immigration context. The court merely held that because of the extensive legislative and administrative power over immigration, the limited scrutiny equal protection test should be applied. The court in Pelaez v. Immigration and Naturalization Service 513 F. 2d 303 (5th Cir. 1975) also applied equal protection standards. The case of Kleindienst v. Mandel, 408 U.S. 753 (1972) cited by the government must be read together with the more recent Supreme Court decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973). There, in the face of a dissent which, citing Mandel and its dicta, asserted that Congressional opinion as to the constitutionality of a immigration statute must be accepted, the majority unequivocally held that "[i]t is clear, of course,

that no Act of Congress can authorize a violation of the Constitution" and that in the immigration field, as in any other, "a resolute loyalty to constitutional safeguards" is required. Almeida-Sanchez, supra, 413 U.S. at 272 and 273.*

The other cases cited by the government are also inapposite. None of the cases supports the proposition that the constitutionality of an immigration statute relating to the exclusion or expulsion of aliens is immune from judicial review. Rather in each case the Court inquired closely into the particular issues and facts of each case and found, after careful analysis, that Congress had made a determination based on considerations which were inappropriate for judicial review such as foreign policy or national security considerations. See for example, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) and Galvan v. Press, 347 U.S. 522 (1954), which both decided the issue of "whether the United States constitutionally may deport a legally resident alien because of membership in the Communist Party..." Harisiades v. Shaughnessy, supra, 342 U.S. at 581. There, the Court recognized the difficulty of delineating a fixed and precise line of separation between

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* See also Justice Powell concurring at 413 U.S. at 275 n.1. and United States v. Brignoni-Ponce - U.S - 45 L.Ed 2d 607, 614 (1975).

judicial and political power and specifically inquired into the particular facts and issues presented by the case before it. The Court found that:

> This act was approved by Present Roosevelt June 28, 1940, when a world war was threatening to involve us, as soon it did. Communists in the United States were exerting every effort to defeat and delay our preparations.

and further

> Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists.
>
> Id., 342 U.S. at 590

The Court in Galvan undertook a similar analysis and found:

> On the basis of extensive investigation Congress made many findings, including that in §2(1) of the Act that the "Communist movement... is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship, "and made present or former membership in the Communist Party, in and of itself, a ground for deportation.
>
> Id., 347 U.S. at 529

Thus the Court deferred to Congressional judgment in the area of national security. The Court in United States ex rel Knauff v. Shaughnessy 338 U.S. 537 (1950) similarly found that the Attorney General could exclude persons from the United States for national security reasons.

Chae Chan Ping v. United States, 130 U.S. 581 (1889) determined the question of whether an existing treaty impaired the validity of a Congressional Act. The court deferred to Congressional judgment in this foreign policy question but recognized that Congressional powers are "restricted in their exercise" by the Constitution, 130 U.S. at 604. Hitai v. Immigration and Naturalization Service, 343 F.2d 466 (2d Cir.) cert. denied, 382 U.S. 816 (1965) upheld a statutory classification on the basis of Japenese origin. The legislative history of immigration statutes involving nationals of Japan demonstrates foreign policy concerns of relationships with Japan reaching back to the time of a treaty formulated by Theodore Roosevelt through World War 11. House Report 1365, 82nd Cong, 2d Sess, pgs. 15, 19,29 (1952). Faustino v. Immigration and Naturalization Service, 302 F. Supp. 212 (S.D.N.Y., 1969) aff'd per curiam 432 F.2d 429 (2d Cir. 1970) cert. denied, 401. U.S. 921 (1971) upheld the rationality of distinguishing between Eastern and Western Hemisphere aliens recognizing the difference in this country's relationship to Western as versus Eastern Hemisphere countries.

Discrimination against petitioner because he remained in the United States after his conviction involves no foreign policy or other determination incapable of being

reviewed by judicially discoverable and manageable standards. See Orlando v. Laird, 443 F. 2d 1039, 1042 (2nd Cir. 1971); Berk v. Laird, 429 F. 2d 302 (2nd Cir.1970). Equal protection standards should therefore be applied and the denial of an opportunity to petitioner to apply for §212(c) be deemed unconstitutional.

New York, New York

January 12, 1976.

Respectfully submitted,

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